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Torts: Use of Comparative Fault in Apportioning Damages for Aggravated Injuries

In addition to the important products liability issues considered by the Minnesota Supreme Court in *Bigham v. J.C. Penney Co.*, the trial court’s disposition of the case raises an important issue concerning apportionment of damages among joint tortfeasors. In *Bigham*, the plaintiff, a linesman for Northern States Power Company (NSP), was badly burned when a “flashover” occurred at the substation where he was working. The injuries Bigham received from the flashover were allegedly aggravated by the fabric in his clothing which, when subjected to the heat of the flashover, melted and clung to his skin. Bigham sought recovery for his injuries from J.C. Penney Co. (Penney), the clothing seller. Because any negligence of NSP in causing the flashover was completely unrelated to any negligent act by Penney, Bigham’s suit was brought only for exacerbated injuries. In such an action, the plaintiff seeks to recover damages for the aggravation of injuries sustained in an accident, even though the defendant was in no way responsible for the occurrence of the accident itself.

1. 268 N.W.2d 892 (Minn. 1978). These issues are discussed at pages 995-1007 supra.
2. A flashover is an electric arc that radiates intense heat. 268 N.W.2d at 894-95.
3. *Id.* at 895.
4. Plaintiff did not sue NSP, because he had received workers’ compensation benefits and was restricted from obtaining a tort judgment against his employer under the exclusive liability provisions of Minn. Stat. § 176.031 (1978). At the time *Bigham* was tried in 1976, however, Penney was able to implead NSP for contribution and indemnity under Minn. R. Civ. P. 14.01 by bringing a third-party complaint.
5. 268 N.W.2d at 895.
6. In this Comment, “exacerbated injuries” and similar terms will be used to refer to injuries made more severe than they would have been and also to injuries sustained that otherwise would not have resulted at all. For example, it is possible to sustain in a collision no injuries other than the injuries caused by a defective part of the car interior. See Sklau, “Second Collision” Liability: The Need for Uniformity, 4 Seton Hall L. Rev. 499, 507 (1973) (referring to such injuries as “second collision” injuries, the second collision being the occupant’s collision with the vehicle interior). Although it is inaccurate to speak of “exacerbated” injuries when no injuries would otherwise have resulted, this is an analytically identical situation; the same principles of allocation of responsibility should be followed.

This Comment will explore the concept of exacerbated injuries by examining past judicial treatment of cases in which a defendant has aggravated a plaintiff's injuries without having caused the original accident, and analyzing the possible defenses available to such a defendant. This Comment will then recommend a procedure to be used in apportioning liability among those who cause an accident and those who cause exacerbated injuries.

The common law rule for apportionment of damages when an injury results from multiple causes is set forth in section 433A of the Second Restatement of Torts. Ordinarily, an injury is treated as indivisible, and all tortfeasors who contributed to the harm are jointly and severally liable for all damages. Damages may, however, be apportioned among multiple causes if there are distinct harms attributable to separate tortfeasors, or if a reasonable basis exists for determining the contribution of each tortfeasor to a single harm. If

7. The supreme court twice acknowledged that Bigham's injuries had been aggravated by the Penney fabric. 268 N.W. 2d at 895, 896. In its discussion of Bigham's assumption of risk, the court noted that Bigham had assumed the risk of flashover injuries, but not the risk of having his burns made more severe by the melting fabric. 268 N.W.2d at 896. The court stated that the jury accepted the "aggravated injury" analysis, even though there was conflicting expert testimony as to whether Bigham's clothes had aggravated his injuries. Id. at 895.

8. See text accompanying notes 19-21 infra.


10. See text accompanying notes 57-60 infra.

11. RESTATEMENT (SECOND) OF TORTS § 433A (1965) [hereinafter cited as RESTATEMENT] provides:

(1) Damages for harm are to be apportioned among two or more causes where
   (a) there are distinct harms, or
   (b) there is a reasonable basis for determining the contribution of each cause to a single harm.

(2) Damages for any other harm cannot be apportioned among two or more causes.

The classic example of the situation in (1)(a) occurs when a plaintiff has been shot by two defendants, one wounding the plaintiff in the arm and the other wounding the plaintiff in the leg. The two wounds may be regarded as distinct injuries, and each defendant is liable only for the damages attributed to the particular wound caused by that defendant. Id. comment b.


13. In some cases, the damages may be severable because a lapse of time makes it obvious that the injuries were caused by distinct occurrences. For cases discussing apportionment of these successive injuries, see Golden v. Lerch Bros., 203 Minn. 211, 281 N.W. 249 (1938); McGannon v. Chicago & N.W. Ry., 160 Minn. 143, 199 N.W. 894 (1924). But see Mathews v. Mills, 288 Minn. 16, 178 N.W.2d 841 (1970) (although injuries were caused by two separate and distinct impacts, trial court determined that
distinct harms caused by separate tortfeasors are shown, the courts treat the harms as separate torts, with each tortfeasor liable only for the damages that he caused.\textsuperscript{14}

In cases involving exacerbated injuries, when one party tortiously aggravates injuries caused by the wrongful conduct of another party, some courts have found that a reasonable basis exists for determining the contribution of each tortfeasor to a single harm.\textsuperscript{15} In such cases, there are two possible methods of allocating responsibility between the parties causing the original injuries and the parties exacerbating those injuries. The first method treats the injuries as entirely separate harms, so that parties who aggravated the injuries will not be responsible for the original injuries, and the parties causing the original injuries will not be liable for the aggravation—a separate-cause approach.\textsuperscript{16} The second method also holds the parties who exac-

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\textsuperscript{14} The injuries were single and indivisible, thus not amenable to apportionment).

Comparative negligence statutes may be viewed as a modification of the common law rule of apportionment of harm to causes. See generally V. Schwartz, Comparative Negligence § 16.7 (1974 & Supp. 1978). The majority of states now have a system of comparative negligence. \textit{Id.} § 1.4-.5, at 11-27; \textit{id. Supp.} at 3-6. Under such statutes, responsibility for a single indivisible harm may be apportioned among multiple tortfeasors in proportion to their causal fault and such an apportionment may be made even in cases when the common law would not allow apportionment of damages. See \textit{Restatement}, supra note 11, § 433A, comment i & illustration 17 (if \textit{A} suffers a fractured skull as a result of collision of two automobiles, negligently driven by \textit{A} and \textit{B}, at common law there was no apportionment; but under a comparative negligence statute \textit{A} might recover).

One feature of the common law rule, however, has been retained under many comparative fault statutes: each tortfeasor remains jointly and severally liable to the plaintiff for the entire amount of damages. Minnesota's comparative fault statute, \textit{Minn. Stat.} § 604.02(1) (1978), provides that "when two or more persons are jointly liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that each is jointly and severally liable for the whole award."

Differences in the states' treatment of joint liability under their respective comparative negligence systems are set forth in the appendix to American Motorcycle Ass'n v. Superior Ct., 65 Cal. App. 3d 694, 708-14, 135 Cal. Rptr. 497, 506-12 (1977).

\textsuperscript{15} In cases in which the plaintiff sustained injuries in successive accidents, courts will hold each tortfeasor liable only for the harm caused by the accident for which he is responsible. For example, if a person suffers a broken leg in an accident, and en route to the hospital the ambulance collides with a car and he suffers a concussion, the party who caused the first accident will be liable only for the broken leg, not for the additional injuries suffered in the ambulance accident. If the extent of plaintiff's injuries in the first accident is unascertainable, however, apportionment may be denied on the grounds that the injuries are indivisible. Compare \textit{Restatement}, supra note 11, § 433A, comment d (successive injuries) with \textit{id.} comment e (divisible harm).

\textsuperscript{16} For example, if a tortfeasor injures the plaintiff, who in turn fails to use due care to mitigate his damages, thereby exacerbating the injury, the tortfeasor will be liable only for the original injury and not for damages relating to the aggravation. \textit{Id.} comment f. See also \textit{id.} comment c, illustration 1.
erbated the injuries responsible only for the exacerbation, but the parties who caused the original injuries may be held liable for all resulting injuries, including the aggravation—a direct-cause approach. For example, under the direct-cause method, if a physician has negligently aggravated the injuries of an accident victim, the physician will be liable for the aggravation, while the accident-causing defendant will be liable for both the original and the exacerbated injuries. It appears that the direct-cause method will be applied when it can be established that the exacerbated injuries followed in a direct, unbroken chain from the conduct of the original tortfeasor. When the chain of causation between the original injuries and the exacerbated injuries is weaker, the separate-cause method will be applied, and the original tortfeasor's liability will be limited to the original injuries.

A recent development in the field of exacerbated injuries is the imposition of liability on sellers whose defective products have aggravated injuries sustained in accidents. These cases differ from the usual exacerbated injury case because the claim for aggravation is not based on the negligence of a second tortfeasor, but rests instead on a products liability theory. For example, the manufacturer of a motor vehicle containing a defect that exposes its occupants to an unreasonable risk of harm in a collision has been held responsible for resulting injuries, even though the collision was not caused by a defect in the vehicle. Similarly, the seller of clothing that causes severe burns

17. See Schanil v. Branton, 181 Minn. 381, 383, 232 N.W. 708, 709 (1930); Viou v. Brooks-Scanlon Lumber Co., 99 Minn. 97, 108 N.W. 891 (1906). See also Couillard v. Charles T. Miller Hospital, Inc., 253 Minn. 418, 422-23, 92 N.W.2d 96, 99 (1958); Benesh v. Garvais, 221 Minn. 1, 20 N.W.2d 532 (1945); Smith v. Mann, 184 Minn. 485, 487-88, 239 N.W. 223, 223-24 (1931); Pederson v. Eppard, 181 Minn. 47, 231 N.W. 393 (1930); RESTATEMENT, supra note 11 § 457:

If the negligent actor is liable for another's bodily injury, he is also subject to liability for any additional bodily harm resulting from normal efforts of third persons in rendering aid which the other's injury reasonably requires, irrespective of whether such acts are done in a proper or a negligent manner.


18. See generally Jackson, supra note 13; Peaslee, Multiple Causation and Damage, 47 Harv. L. Rev. 1127 (1934); 21 Minn. L. Rev. 616 (1937).

19. See, e.g., Higginbotham v. Ford Motor Co., 540 F.2d 762 (5th Cir. 1976) (strict liability); Larsen v. General Motors Corp., 391 F.2d 495, 503 (8th Cir. 1968) (negligence); Huddell v. Levin, 365 F. Supp. 64 (D.N.J. 1975), rev'd, 537 F.2d 726 (3rd Cir. 1976) (strict liability). These automobile defect cases are referred to as "crashworthiness" cases because the manufacturers are held to a legal duty to design vehicles that will protect their occupants from unreasonable risks of injury in the event a vehicle crashes. These cases are also categorized as "second collision" cases when additional injuries are caused by the force of an occupant colliding with a part of a
when ignited in a fire created by another cause has been held liable for injuries resulting from those burns. In some of these cases, courts have apportioned responsibility for damages by using a "two-injury" or "two-accident" approach: the seller of the product responsible for the second or exacerbated injury is liable only for damages attributed to that injury and is not liable for the original injuries that would have been incurred anyway. In such cases, it is not clear which of the two methods of apportionment discussed above will be followed. In other words, it is uncertain whether the tortfeasor who caused the original accident or injuries will be held to be a direct cause of the aggravated injuries.

In all the cases in which responsibility is allocated under section 433A, the apportionment is accomplished as a matter of common law without use of comparative negligence statutes. Comparative negligence in many states, including Minnesota, is used to measure the relative contribution of multiple parties to a single injury. In exacerbated injury cases, however, comparative negligence should not apply, since the apportionment is not between those responsible for a single injury, but is instead between those responsible for the original injury and those responsible for the aggravated injury. The tortfeasor causing the exacerbated injury is liable only for damages for that injury. Since he cannot be held responsible for injuries that would have occurred regardless of his conduct, it is inappropriate to


21. See, e.g., Larsen v. General Motors Corp., 391 F.2d 495, 503 (8th Cir. 1968): Any design defect not causing the accident would not subject the manufacturer to liability for that portion of the damage or injury caused by the defective design over and above the damage or injury that probably would have occurred as a result of the impact or collision absent the defective design.
22. MINN. STAT. § 604.01, .02(2) (1978).
24. RESTATEMENT, supra note 11, § 433A, comment c.

In Larsen, the Eighth Circuit rejected the contention that the exacerbated injuries could not be separated from the other accident injuries:

The obstacles of apportionment are not insurmountable. It is done with regularity in those jurisdictions applying comparative negligence statutes
compare the fault of the two parties.

The Minnesota Supreme Court has implicitly followed the rule of section 433A and has upheld apportionment of damages in cases in which there were distinct harms or in which a reasonable basis existed for apportioning each cause to a single harm. The supreme court and other courts applying Minnesota law have divided responsibility between tortfeasors when physicians negligently aggravated injuries inflicted by another tortfeasor, and when injuries in an accident were exacerbated due to a defect caused by a vehicle manufacturer. It is not yet clear, however, whether or how the comparative negligence statute will be applied in these situations.

In Bigham, the plaintiff sought recovery for the extent to which his burn injuries were aggravated by the clothing sold by Penney. Penney raised as defenses the conduct of both Bigham and NSP. While the conduct of these parties may have caused the original accident, it was completely unrelated to the burning characteristics of the clothing. Nevertheless, the trial court submitted the case to the jury with instructions to compare the fault of Penney, NSP, and Bigham, thereby permitting the conduct of parties causing the original accident to be a defense to an action for exacerbated injuries. The trial court also required the jury to apportion damages among all parties on the basis of an allocation of causal “fault” under the comparative negligence statute. The jury found all three parties causally at fault, and the trial court entered judgment accordingly.

and in other factual situations as condemnation cases, where in some jurisdictions the jury must assess the value of the land before and after a taking and then assess a special benefit accruing to the remaining property of the condemnee.

391 F.2d at 503-04 (8th Cir. 1968). This should not be interpreted to mean that a comparative negligence statute should be applied to allocate responsibility between accident-causing and injury-enhancing defendants. Instead, the court was only stating that where a rational basis for allocation exists, responsibility may be apportioned; by analogy, a jury can apportion damages between original and exacerbated injuries on proper proof.

26. See note 17 supra.
16112 (Minn. Dist. Ct., Redwood Cty., Mon. 00, 197X) (motorcycle).
28. 268 N.W.2d at 895.
29. Id.
30. Id.
31. Id. Accident-causing conduct should, however, be no defense to a claim for enhanced injuries. See Sklaw, supra note 6, at 528-29; Note, Apportionment of Damages in the “Second Collision” Case, 63 Va. L. Rev. 475, 498 n.105 (1977). A Michigan commentator noted:
peal, the supreme court affirmed the trial court's judgment in part, but did not discuss whether the trial court's procedures for allocating responsibility were correct.

Penney should not have been permitted to interpose as a defense the misconduct of Bigham and NSP in causing the accident. Allowing a party who aggravates injuries to raise a defense based on the accident-causing fault of other parties defeats the purposes for which liability for exacerbated injuries is imposed. It is anomalous to impose a duty to avoid aggravation of injuries caused by another, and yet permit a party who has breached that duty to limit or escape liability because of the misconduct of those who caused an accident, which is the very eventuality that brings the duty into play. Consequently, the comparative fault defenses of one who has aggravated the plaintiff's injuries should be limited to those based on the conduct of others that contributes to the exacerbation of injuries.

In a negligence action, the manufacturer may argue that it should not be held liable even for the enhancement of plaintiff's injuries because plaintiff's negligence was a participating cause in his collision with a vehicle. In most jurisdictions this defense of contributory negligence will relieve the driver of the vehicle from liability for mere negligence. But plaintiff's negligence should not be a defense for a manufacturer in an action for enhancement of injuries.

Note, supra note 25, at 1666.

The question has not arisen often, perhaps because many courts follow the rule of comment n to § 402A of the Second Restatement of Torts and do not permit general contributory negligence as a defense to any strict products liability action. See, e.g., Melia v. Ford Motor Co., 534 F.2d 745 (8th Cir. 1976); Ellithorpe v. Ford Motor Co., 503 S.W.2d 516 (Tenn. 1973). Minnesota does not follow the comment n approach on limitation of defenses, however, and contributory negligence is a defense to a product liability action. See Busch v. Busch Constr., Inc., 262 N.W.2d 377, 394 (Minn. 1977). Therefore, the issue of whether accident-causing contributory negligence should be a defense to an exacerbated-injury or second-collision claim is likely to arise in Minnesota. In Juhlin v. Bemis, No. 5-76-68 (D. Minn. Dec. 29, 1978) a federal court applying Minnesota law properly limited the defenses available to the aggravation-causing defendant.

32. Apparently, the plaintiff made no objection at trial to the submission of defenses based on his contributory negligence or the negligence of NSP.

The supreme court found independent grounds for exonerating NSP. See 268 N.W.2d at 898-99. Had such grounds not existed, the trial court nevertheless should not have allowed the accident-causing conduct of NSP to be interposed as a defense, for the reasons given herein.

33. See Sklaw, supra note 6, at 527-28; Note, supra note 25, at 1666; Note, supra note 31, at 499-500. For example, it is doubtful that a court would permit a physician who negligently aggravated a plaintiff's injuries to defend on the ground that plaintiff was "contributorily negligent" for being injured when he sought the physician's aid.

34. Examples of such defenses, based on plaintiff's misconduct, include the following: in an action against a physician for aggravation of injuries, the plaintiff's negligent failure to disclose facts that would have enabled the physician to avoid the
The best and simplest way to solve this problem is to apply the separate-cause method of apportionment and hold that those parties having caused the original injuries are not responsible for the exacerbation. The separate cause method is consistent with the foreseeability element of proximate cause. Although it is foreseeable that one's actions may cause injury, it is often not foreseeable that such injury will be aggravated by another. Under the separate cause method, once it is established that a divisible portion of the total harm is due to the tortious conduct of the party alleged to have aggravated the injuries, the chain of causation is broken for the parties causing the original injury, and they will not be held responsible for the harm resulting from the aggravation of the injury. Because the conduct causing the original injury is not considered to be a cause of the aggravated injuries, no comparative fault defense based on such conduct should be available to the exacerbating defendant.

If, however, the direct-cause method of apportionment is used, the problem is more difficult. Under that method, the conduct of parties that caused the original injury is treated as a proximate cause of aggravation, see Ray v. Wagner, 286 Minn. 354, 176 N.W.2d 101 (1970) (before enactment of the comparative negligence law, a patient's giving of misleading information to a physician barred recovery in malpractice actions); in a case against a vehicle manufacturer for its "uncrashworthy" interior, the plaintiff's negligent failure to wear a seatbelt, see Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); in an action against the seller of clothing worn in a high thermal environment, the plaintiff's unreasonable disregard of warnings not to use the clothing in such environments, see Bigham v. J.C. Penney Co., 268 N.W.2d 892 (Minn. 1978) (no such misconduct was present in Bigham; although the plaintiff may have assumed the risk of the original "flashover" accident and have been negligent in causing it, see 268 N.W.2d at 895, he did nothing to exacerbate his injuries. Contributory negligence causing the original injury should therefore have been no defense to the claim for exacerbated injuries.).

35. See text accompanying note 17 supra.

36. For example, it would be difficult to sustain the proposition that NSP should have foreseen that work clothing worn by its employees would melt and cling, causing severe burns, if exposed to flashovers. Imposing liability for aggravated injuries on the party causing the original injury is, therefore, justified primarily by policy considerations. Restatement, supra note 11, § 457, which imposes liability on an accident-causing defendant for injuries caused by a negligent physician, seems to be based more on the policy that the accident-causing defendant should not be able to raise the physician's negligence as a defense than on a foreseeability rationale. See, e.g., Jess Edwards, Inc. v. Goergen, 256 F.2d 542, 544 (10th Cir. 1958); Persten v. Chesney, 212 S.W.2d 469, 475 (Mo. Ct. App. 1948). Another policy underlying such liability may be to ensure that the plaintiff will be able to recover from a solvent defendant; if the physician is insolvent, the plaintiff can recover from the accident-causing party. See Prosser, The Minnesota Court on Proximate Cause, 21 Minn. L. Rev. 19, 20 (1936).

37. In other words, the claim for exacerbated injuries should be treated as separate and distinct from that for injuries that would have occurred in any event.
of the exacerbated injuries.\textsuperscript{38} Consistency would, therefore, seem to require that the exacerbating defendant be able to obtain contribution from the defendants whose conduct caused the original injury and was a direct cause of the aggravation.\textsuperscript{39} For a number of reasons, however, this argument should be rejected.\textsuperscript{40} First, some decisions indicate that one who tortiously aggravates an injury is liable to the accident-causing defendant for damages paid by the latter to a plaintiff for his exacerbated injuries.\textsuperscript{41} Although the accident-causing defendant may be held liable to the plaintiff for the aggravation, such a defendant is entitled to "plead over" against the exacerbating party, because plaintiff's right of recovery against that party is subrogated to the accident-causing defendant.\textsuperscript{2} The inference to be drawn from these decisions is that the exacerbating defendant cannot obtain

\begin{footnotesize}
\textsuperscript{38} See text accompanying note 13 supra.
\textsuperscript{39} The argument goes as follows: Although the injury-enhancing defendant is responsible for damages for the aggravated injuries, an accident-causing party is also liable for those damages under the principle that an individual who caused an accident is liable for all of the consequences that proximately result, including exacerbated injuries wrongfully caused by another. See Restatement, supra note 11, § 457 (physician exacerbates injuries). Consequently, because both parties are fully liable for the damages for enhanced injuries, the right of contribution should exist between them under Minnesota case law and the comparative fault statute. See Tolbert v. Gerber Indus., Inc., 255 N.W.2d 362, 367-68 (Minn. 1977) (right to contribution exists whenever there is a common liability for the same harm); Minn. Stat. § 604.02 (1978) (contribution under comparative fault statute between tortfeasors who are jointly liable). Since Tolbert defined joint liability to include situations in which the acts of multiple tortfeasors, whether concurrently or successively, combine to cause a single harm, 255 N.W.2d at 366 & n.1, it can be argued that the accident-causing and injury-exacerbating tortfeasors are joint tortfeasors for the exacerbated injuries.

\textsuperscript{40} The reasons for not permitting plaintiff's accident-causing contributory negligence to be raised as a defense to an exacerbated-injury claim have already been given. See note 33 supra and accompanying text. Although some authorities hold that an accident-causing defendant's conduct is a proximate cause of the exacerbated injuries, see Restatement, supra note 11, § 457, it does not appear that such conduct by the plaintiff is treated similarly. See note 33 supra. Otherwise, a plaintiff's negligence that causes him injury could be raised as a defense to an action against a physician for negligent aggravation of his condition. No case has been found where such a defense was permitted.

\textsuperscript{41} See, e.g., Pederson v. Eppard, 181 Minn. 47, 50, 231 N.W. 393, 394 (1930) (dictum); Greene v. Watens, 260 Wis. 40, 43, 49 N.W.2d 919, 922 (1951) (accident-causing tortfeasor who settled plaintiff's claim may recover, by right of subrogation, amounts owed to plaintiff by physician for aggravated injuries caused by physician); Noll v. Nugent, 214 Wis. 204, 208, 252 N.W. 574, 575 (1934) (same); Fisher v. Milwaukee Electric Ry. & Light Co., 173 Wis. 57, 60, 180 N.W. 269, 271 (1920) (same).

\textsuperscript{42} This is not classified as contribution or indemnity. Instead, it is treated as a cause of action based on the subrogated rights of the plaintiff; the accident-causing defendant who paid plaintiff's claim may enforce plaintiff's cause of action against the exacerbating party to recover damages paid in settlement for the aggravated injury. See note 41 supra.
\end{footnotesize}
contribution from the accident-causing defendants. Second, the right to contribution exists only when there is joint liability for a single injury. Since the accident-causing and the injury-enhancing parties are not joint tortfeasors, there is no basis for allowing the latter to obtain contribution. Third, the rule that the original, accident-causing defendant is liable for all resulting damages, including those for enhanced injuries, may be justified by the remedial policy of not permitting that defendant to escape liability because of the subsequent misconduct of one who enhances the injury. That policy, however, does not justify allowing the injury-enhancing defendant to obtain contribution from the accident-causing parties. Finally, the same policy that precludes the accident-causing negligence of the plaintiff from being asserted as a defense should preclude contribution from the accident-causing defendant to the exacerbating defendant. The party responsible for the exacerbation should not be permitted to reduce his responsibility by obtaining contribution from a party whose accident-causing misconduct would not have caused the enhanced injuries but for the injury-exacerbating defendant's fault.

The availability of a comparative fault statute, such as that provided in Minnesota, should not change these principles. There is a danger that comparative fault will be seen as a panacea for all of the difficulties of apportionment. For example, it has been suggested that such statutes be used as a means of allocating responsibility for all harms, including enhanced injuries, between all accident-causing and injury-aggravating tortfeasors on the basis of a single comparison of causal fault. Such a solution would permit accident-causing fault to be compared with injury-exacerbating fault, and would combine apportionment of damages with comparison of fault.

Despite the simplicity of such an approach, for several reasons it should not be adopted. First, it has generally been held that the adoption of comparative negligence does not create new liabilities or abolish existing ones. A comparative fault standard typically contains a joint and several liability provision which could operate to shift the burden of an uncollectable liability to a less blameworthy party. Use of comparative fault to allow accident-causing fault to

43. See Minn. Stat. § 604.02 (1978); note 44 supra.
44. See Restatement, supra note 11, § 433A, comment i.
45. See note 36 supra.
46. See text accompanying notes 32-34 supra.
47. Minn. Stat. §§ 604.01-.02 (1978).
50. See note 23 supra.
be raised as a defense to an exacerbate-injury claim is, therefore, contrary to generally accepted notions about the intended effect of comparative negligence statutes. Second, comparative fault is a concept distinct from that of the apportionment of harms among separate causes. The former is designed to allocate responsibility for a single injury on the basis of the causal fault of each party. The latter is aimed at allocating responsibility among actors who have caused separate injuries. The comparison statute is therefore inappropriately used when combined with apportionment of harms in a single exercise.\textsuperscript{51} Third, such a procedure would, in effect, abolish the common law distinction between original and enhanced injuries, and treat all harms resulting from an accident as a single indivisible injury. There is no reason to believe that legislatures, in enacting comparative fault statutes, intended to work this change in common law.\textsuperscript{52}

\textsuperscript{51} Under such a system, the jury would be required to apportion both fault and the amount of damages attributable to separate causes in a single allocation of percentages. If, for example, the accident-causing party caused 10\% of the damages, but was much more negligent than the injury-aggravating defendant, who caused 90\% of the damages, the jury would have to balance fault and damages in a single apportionment. This could lead to confusion and arbitrary results. See notes 53-56 infra and accompanying text.

\textsuperscript{52} A statute in derogation of the common law should be strictly construed, see Bloom v. American Express Co., 222 Minn. 249, 253, 23 N.W.2d 570, 573 (1946), except that a remedial statute may be liberally construed to effectuate the intended remedy, see Blankholm v. Fearing, 222 Minn. 51, 56, 22 N.W.2d 853, 855 (1946). Since the Minnesota comparative negligence statute is in derogation of the common law rule that contributory negligence is a complete bar and since the remedial purpose of the statute will not be furthered by permitting an injury-aggravating defendant to defend on the basis of the accident-causing conduct of the plaintiff or other defendants, the comparative negligence statute should not be applied so as to abolish common-law distinctions between original and exacerbated injuries, or to supersede the principles of § 433A of the Restatement.

The recent amendment to the comparative fault statute defines "fault" to include unreasonable failure to mitigate damages. Minn. Stat. § 604.01(1) (1978). Because failure to mitigate damages is analytically the same as causing exacerbated injuries, see Restatement, supra note 11, § 433A, comment f, it could be argued that the legislature intended failure to mitigate damages (and, by analogy, similar injury-aggravating conduct) to be compared with accident-causing conduct in a single allocation of fault. This argument should be rejected. The recent amendment in the statute did no more than codify the common law, which recognized that failure to mitigate damages is a type of contributory fault. See id. § 433A, comment f, § 918. Such contributory fault in failing to mitigate did not, however prohibit the plaintiff from recovering for injuries which he could not have mitigated; such injuries were treated as separable from the aggravated injuries caused by failure to mitigate. Id. There is no indication that the legislature intended to change these principles. Consequently, the amendment should be interpreted to permit comparison of plaintiff's failure to mitigate damages with defendant's conduct only when defendant's conduct itself aggravated the injuries.
Finally, and most importantly, a single comparison of all conduct causing any injury would be likely to prejudice either a plaintiff or a defendant. The plaintiff would be prejudiced in those situations in which his accident-causing fault would, under a "modified" comparison statute, bar him from all recovery, even though the common law would allow him to obtain damages for enhanced injuries. The same procedure could also prejudice an injury-enhancing defendant. While the common law limits the injury-exacerbating party's liability to damages for aggravated injuries, the rule of joint and several liability in the comparison statute could result in that party's bearing more than his share of the loss, including damages for original injuries that he did not cause, if the party responsible for the original injuries were financially unable to discharge liability for those injuries.

The proper use of comparative fault in exacerbated-injury cases is to allocate responsibility among all direct causes of a single harm; it should not be applied to apportion responsibility between separate causes for separate harms. In a case involving exacerbated or second-collision injuries, the court should apply a common-law "two-injury" or "two-accident" approach to distinguish between the harm caused by the original accident and that due to the second accident—the aggravated injury. Comparison of fault would then be used as necessary to allocate responsibility for each separate harm. Such a procedure would clearly distinguish between the apportionment of separate harms to separate causes and the allocation of responsibility between several causes of a single harm.

This procedure could be implemented as follows. First, the jury

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53. A "modified" comparative negligence statute such as Minnesota's permits a plaintiff to recover from only those defendants whose percentage of causal fault is equal to or greater than the plaintiff's. See Minn. Stat. § 604.01 (1978).

54. If, for example, the plaintiff is found to be 40% at fault in causing the accident, and the accident-causing and the injury-aggravating defendants are each found to be 30% at fault, the plaintiff would be barred from recovery under the Minnesota comparative fault statute. Minn. Stat. § 604.01(1) (1978). If, however, the plaintiff's accident-causing conduct were only compared with the defendant who caused the original accident, the plaintiff could still recover from the exacerbating defendant for the injuries he alone caused. The latter approach is consistent with common law treatment. See note 33 supra.

55. See text accompanying notes 11-17 supra.

56. See Minn. Stat. § 604.02(2) (1978).

57. See, e.g., Higginbotham v. Ford Motor Co., 540 F.2d 762, 766-67 (5th Cir. 1976); Juhlin v. Bemis, No. 5-76-68 (D. Minn. Dec. 29, 1978). The Bigham trial court applied a variation of the two-accident approach when it held that plaintiff assumed the risk of burn injuries from a flashover, but not the risk of exacerbated-burn injuries caused by the melt-and-cling effect of the clothing. 268 N.W.2d at 895-96. The court did not go further, however, and limit the defenses based on accident-causing conduct of NSP and the plaintiff.
would be instructed to determine whether the parties alleged to have caused the original accident were at fault, whether their fault was a direct cause of the accident, and what their respective percentages of causal fault are. The injury-aggravating parties would not be involved in this apportionment. Second, the jury would be asked whether the party alleged to have aggravated the injury was at fault and whether that fault was a direct cause of aggravated injuries. If more than one party caused the exacerbation, there would be a separate allocation of responsibility under the comparative fault statute. Parties whose conduct contributed only to the original accident would not, however, be included in this apportionment. Fault would therefore be compared only when the conduct of more than one party contributed to the exacerbation itself. Third, the jury would calculate the total amount of damages sustained in the accident. Fourth, if the jury in the second step found that there was an exacerbation of injuries, the jury would be required to determine the amount of the total damages attributable to the aggravated injuries. The trial court would enter judgment accordingly: damages for exacerbated injuries would be apportioned on the basis of the jury's comparison of fault, with each exacerbating defendant remaining jointly and severally liable to the plaintiff for the collective amount of damages for enhanced injuries attributable to it. Damages for the original injuries, which would have occurred in any event, would be apportioned on the basis of accident-causing fault, with each defendant remaining jointly and severally liable to the plaintiff for the full amount of damages not caused by the plaintiff's contributory fault. There would be no joint and several liability between accident-causing and injury-enhancing defendants.

In a case such as Bigham, involving only exacerbated injuries, only the second and fourth steps outlined above would be used. In Bigham, the jury should have been asked only whether there was an aggravated injury caused by Penney and what amount of damages

58. In Juhlin v. Bemis, No. 5-76-68 (D. Minn. Dec. 29, 1978), the jury was asked to determine what percentage of plaintiff's total damages was attributable to the aggravated injuries.

59. See note 12 supra. Should the court apply the separate-cause method of apportionment, see note 16 supra and accompanying text, the accident-causing parties would not be liable for the exacerbated injuries. Should the court apply the direct-cause method, see note 17 supra and accompanying text, the accident-causing parties would be liable for aggravated injuries, but there would be no joint liability with the injury-aggravating parties. Furthermore, the accident-causing defendants could recover from the injury-exacerbating parties, by right of subrogation, any amounts representing aggravated injuries paid by the accident-causing defendants to the plaintiff. See notes 41-42 supra and accompanying text.

60. See note 5 supra.
was attributable to that aggravation. Since the facts do not disclose conduct by other parties that would be a defense to the enhanced injury claim against Penney, there should have been no apportionment of causal fault, and Penney should have been held liable for the full amount of damages for the exacerbated injuries.

In cases involving claims of exacerbated injury, the threshold issue is whether there is a rational basis for considering the injuries to be divisible in nature. Applying a “two-accident” analysis, the court can then ask what damages are attributable to the original accident and what damages are attributable to the injury-aggravating defendant. When such a process of apportionment is employed, the conduct of those who cause the original accident is not compared with the conduct of those whose products aggravate the injuries. Courts applying this procedure will hold parties responsible only for those damages they directly cause, thus maintaining the policy of limiting liability to results that directly flow from tortious conduct. This procedure has been set forth in simplistic terms, but even in a rudimentary form, such apportionment is preferable to a practice of comparing the fault of all the defendants for the aggregate of a plaintiff’s injuries.